brought by a person who had paid money under such contract, but he must bring an action for the breach of contract; but, in cases where the contract was rescinded and put an end to, as in the present case, an action for money had and received would lie. This was what the respondents claimed and the issue was whether the money could be recovered as money had and received.

In order to succeed in an action for money had and received, the plaintiff had to prove that there was a total failure of consideration and the parties could be restored to their original position. According to *Halsbury's* Laws of England 3rd Ed. Vol. 8 at page 243 paragraph 421:

"Where a plaintiff has paid money in pursuance of his obligations under a contract, and the consideration for which he entered into the contract totally fails, he may either sue for damages for breach of contract, or bring an action for the return of the money so paid as money had and received to his use.

Where, however, the failure of consideration is not total but merely partial, then, unless the contract has been frustrated, the plaintiff is restricted to an action for damages for breach of contract.

A complete failure of the consideration of a contract occurs where one of the contracting parties fails to receive some benefit or valuable consideration which springs from the root and is in the essence of the contract. If, however, he once receives such a benefit then he has no remedy in this form of action."

In the case of *Colton* v. *Dorrell,*[2] the headnote reads:

"The plaintiff agreed to let to the defendant a house at a certain rent, a premium to be paid on the completion of the lease. The defendant was let into possession and paid part of the premium. He subsequently refused to take the lease, owing to some difference about the terms of the agreement.

The plaintiff sued for use and occupation of the premises. The defendant pleaded set-off.

**Held:** that he was not entitled to set-off the part of the premium he had paid, as there had not been an entire failure of consideration."

Keating J. observed:

"There has been a part performance of the contract; the defendant has taken possession of the premises, and paid the plaintiff £42 on account. This sum cannot be used as a set-off, as the consideration has not wholly failed, and the parties cannot be put in *statu quo*, for the defendant has been let into possession. If there has been a breach of the contract on the part of the plaintiff, the defendant has his remedy on the agreement, and in this way the question would be raised as to his liability to pay to the plaintiff the £9. He has no right of set-off against him."

See also *Hunt* v. *Silk.*[3]

In the present case the consideration was the tribute and there was no total failure of consideration as some tribute had been paid. Therefore in my opinion no action would lie for money had and received.

Counsel for the respondents argued that as there was no forfeiture clause in the agreement, the money should be refunded. He referred to the cases of *Mayson* v. *Clouet,*[4] *Lee Sau Keng* v. *Yong Hon Fa,*[5] and *Dies and anor.* v. *British and International Mining and Finance Co. Ltd.*[6] The case in question differed from the above cases as there was no deposit and there was no frustration, merely recission of contract.

Another point to consider was the true construction of clause 2(c) of the agreement which reads as follows:—

"That the sum of dollars seven thousand seven hundred and sixty-two ($7,762) shall be treated as advance payments of tribute and the sub-lessees shall be at liberty to deduct twenty-five (25) per centum of the tribute payable by them hereunder until such time as the said sum of $7,762 is fully repaid and thereafter the full tribute shall be paid by the sub-lessees to the sub-lessor."

It appeared to me that the sum of $7,762 was advance payments of tribute to be deducted at the rate of 25% of the tribute payable by the respondents to the appellant. The respondents would continue to do so until the said sum was fully repaid after which the full tribute should be paid by the respondents to the appellant. Therefore in my view the true construction would be that the amount was an advance of the tributes and since it had to be deducted from the tributes and as no further tributes were payable, there could be no claim for the balance.

To recapitulate, as there was a recission by mutual consent, as the respondents could not claim for money had and received because there was no total failure of consideration and the parties could not be restored to their original position, and as upon the true construction of clause 2(c) in the agreement, the amount was treated as advance payment of tributes and such payment was to be deducted from the tributes which later ceased to be paid, the claim by the respondents for the balance must necessarily fail. In the circumstances I would allow the appeal with costs.

**Tan Ah Tah F.J.** concurred.

*Appeal allowed.*

Solicitors: *S. M. Yong & Co.; Skrine & Co.*

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## LING HOCK TEE v. GOH CHOON MOI

**[A.C.J. (McGilligan J.) May 13, 1965]**

**[Sibu — Civil Appeal No. 2 of 1965]**

*Practice and Procedure — Trial — Change of magistrates — Evidence recorded by previous magistrate relied on by subsequent magistrate — Consent of parties not obtained —Whether procedure irregular.*

The plaintiff's claim was for a sum of money arising out of "hui" transaction. The case was originally heard by a magistrate, who heard the evidence of the plaintiff, two witnesses for the plaintiff and the defendant. The case was then adjourned. Subsequently the parties

appeared before a different magistrate, who took the evidence of two witnesses for the defendant and then gave judgment for the plaintiff.

**Held:** as there was no specific agreement to a change of magistrates and there was nothing in the record to show that the parties were asked whether they agreed to such change of magistrates the procedure followed in this case was improper and irregular and therefore a new trial should be ordered.

*Cases referred to:—*

(1) *Chua Chee Chor* v. *Chua Kim Yang & Ors.* [1960] M.L.J. 127.

(2) *Bolton* v. *Bolton* [1949] 2 All E.R. 908.

(3) *Coleshill* v. *Manchester Corporation* [1928] 1 K.B. 776.

CIVIL APPEAL.

Parties in person.

**McGilligan J.:** This is an appeal from the court of small causes, Sibu, brought by the defendant in that court as appellant in this one.

The claim in the lower court was for $140 allegedly arising out of two "hui" transactions involving the respondent and the appellant. At the end of the case judgment was given for the respondent (plaintiff) for the sum claimed with costs.

The first ground of appeal was

"that there had not been a fair trial — changes of three (3) magistrate".

It is not necessary to set out the other ground, as on this first ground I am going to decide this appeal.

The history of the proceedings in the lower court is set out in the following three paragraphs.

On 13th August 1964 the parties appeared before Mr. Bennet Empan. The defendant disputed the claim, and the case was fixed for hearing on 9th October 1964.

On 9th October 1964 the parties appeared before Mr. Michael Tan. On that day and on 4th December 1964 Mr. Michael Tan heard the evidence of the plaintiff, and of the two witnesses for the plaintiff, and of the defendant. The case was then again adjourned.

On 25th January 1965 the parties appeared before Abang Yusof, who on that day and on 20th February 1965 took the evidence of the two witnesses for the defendant and then gave his judgment in favour of the plaintiff.

There was, of course, nothing wrong in the case coming before Mr. Michael Tan after it had been mentioned (and only mentioned) before Mr. Bennett Empam; but I consider there was much wrong, irregular, and out of order in Abang Yusof's taking over the case, after Mr. Michael Tan had heard the major part of the evidence, hearing two witnesses for the defence, and then giving judgment on their evidence, heard by him, and on the evidence, recorded by Mr. Tan, of the plaintiff, of her witnesses, and of the defendant.

A case bearing on this point is the case of *Chua Chee Chor* v. *Chua Kim Yong & Others.*[1] In that case Thomson C.J. (as he then was) said —

"The case had an unfortunate history. It came on for hearing in October, 1954, before a judge who heard all the evidence but who reserved judgment and was then obliged on medical grounds to retire before he could give judgment. In these unfortunate circumstances the normal course would have been for the case to be retried *de novo*. This, however, would have involved considerable expense and in the event the parties asked that Neal J. should decide the case on the evidence as recorded by his predecessor.

For myself I have grave doubts as to the regularity of this course, particularly as there was a great deal of conflict of testimony in the case. It is only fair to say that Neal J. had considerable doubts himself. On the other hand the case can be distinguished from the English cases of *Bolton* v. *Bolton*, *Coleshill* v. *Manchester Corporation* and *Re British Reinforced Concrete Engineering Co. Ltd.'s application*. In all these cases part of the evidence was heard by the magistrate or judge who commenced the case and part was heard by the magistrate or judge who concluded it and gave judgment. In the present case, however all the evidence was heard by Neal J.'s predecessor and Neal J., did not see or hear any of the witnesses. The parties themselves agreed to the case being decided on the evidence as recorded by Neal J.'s predecessor. Before us neither party has taken the point of irregularity and in the circumstances for myself I am not disposed to take the point although I would express my very strong view that the precedent is not one to be followed."

The headnote to the case of *Bolton* v. *Bolton* [2] mentioned in the quotation given in the previous paragraph of this judgment reads as follows:—

"The wife brought a summons against her husband on the ground of persistent cruelty. After one metropolitan magistrate had heard the whole of the wife's evidence in chief the hearing was adjourned. On the date of the resumed hearing another magistrate was sitting and both parties assented to his dealing with the case. Thereupon the notes of the wife's evidence were read and she swore: 'That evidence is true,' and was cross-examined.

**Held:** (1) where proceedings have been started and evidence given before a judge or magistrate who is judge both of fact and law it is not proper, even with the consent of the parties, to continue the proceedings before another judge or magistrate, especially where there is the slightest risk of any conflict of evidence.

Observations of Scrutton L.J., in *Coleshill* v. *Manchester Corporation* ([1928] 1 K.B. 785), and MacKinnon J., in *Re British Reinforced Concrete Engineering Co. Ltd.'s application* (1929) (45 T.L.R. 186), applied.

(2) in the present case there was a grave conflict of evidence and the second magistrate (who made an order in favour of the wife) was not in a position to compare the evidence of the husband with that of the wife which he had not heard, and the whole proceeding was irregular, but the case was so clear that it would be wrong to send it back and the husband's appeal must be dismissed."

Lord Merriman P. in giving judgment said, *inter alia*

"Everything that has been said about the advantages of seeing and hearing the witnesses as against an appellate tribunal which only reads evidence on paper,

applies a fortiori to a court which only reads the principal evidence on paper and hears the rest of the evidence *viva voce.*"

and

"It must be said plainly that this was a wholly irregular proceeding and ought not to be repeated. Everyone can understand the temptation to make a short cut like this, but, particularly in a case which is going to depend on the conflict between the two principal witnesses, it is essential to remember the commonplace that it is important not merely that juctice should be done but that it should manifestly be seen to be done."

In the case of *Coleshill* v. *Manchester Corporation,*[3] also mentioned in the quotation given above from the judgment of Thomson C.J. (as he then was), Scrutton L.J., in giving judgment said

"This case was heard under melancholy circumstances. Mr. Justice Fraser, who began the case on Thursday, July 7, and had heard three of the plaintiff's witnesses, was taken ill during the night and died on the Friday. Mr. Justice Acton was sent down from London on the Sunday and, having read Thursday's shorthand notes, at the urgent request of the parties continued the case with the same jury on Monday, the 11th, the Thursday's witnesses not being recalled. I can understand that in the unprecedented and painful circumstances it is unnecessary to take any objection to what happened, but I think it is a precedent which should not be followed in future. I doubt whether a judge has any jurisdiction to continue the hearing of a case in which witnesses have been called in court in the course of the trial before the jury and another judge, it not being a case of evidence being taken on commission or before an examiner."

It is to be noted that in all these three cases the parties consented to the judge, or magistrate, who took over half way (or later) through the case deciding it on evidence (in part or "in toto") not heard by him, but heard and recorded by the first judge, or magistrate. In the instant case there was no specific agreement to the change of magistrates; there is nothing on the record to show whether the parties were asked whether or not they agreed to the change, and the probability is that the last magistrate, Abang Yusof, simply proceeded with the hearing begun by Mr. Michael Tan without any thought that the course might not be a proper one.

Again, in all three cases the appeal court stated that the course taken was irregular and improper (Scrutton L.J. saying that he doubted if the judge who gave the trial judgment had any jurisdiction) and a precedent emphatically not to be followed. In each case, however, the appeal court, in the peculiar circumstances before it, did not see fit to allow the appeal or order a new trial because of the irregularity and impropriety of the course followed.

The instant case is, in my judgment, quite to be distinguished from the three mentioned above. Not only was there a conflict of evidence, as the defendant in her evidence did not admit any part of the plaintiff's case except to agree, impliedly, that she was head of one "hui" (the plaintiff said she was head of two); but more, it is impossible, to my mind, to tell from the defendant's recorded evidence exactly what she did mean, what position she took, what her defence was. On the evidence and pleadings before the trial court this was by no means a clear case.

I am satisfied that in this case, because of the improper and irregular procedure followed, and in all the circumstances, a new trial should be ordered. In fact I go further, it is my opinion and judgment that when a magistrate takes over a case already heard or part heard by another and (without recalling the witnesses already heard, but accepting the evidence recorded by the original magistrate) gives judgment or proceeds to hear further evidence and then give judgment, he has acted without jurisdiction and the purported trial is a nullity. It is, perhaps, just possible that the parties' full and express consent to, or request for, the second magistrate's taking over can give him jurisdiction; I do not have to decide that point here, but would add my word to that of the learned judges already quoted, and say that this course is one which should never be taken.

This appeal is allowed. The judgment and order of the trial court (including the award of costs) is set aside and a new trial before a magistrate other than Mr. Michael Tan or Abang Yusof is ordered.

As I consider fair in the circumstances I make no order as to the costs of the appeal.

*Appeal allowed.*

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## LIM CHONG KOOI v. PUBLIC PROSECUTOR

[A.C.J. (Ong J.) May 20, 1965]

[Ipoh — Criminal Appeal No. 83 of 1964]

*Prevention of Corruption Act, 1961, ss. 4(a), 6(1), 14 and 15(1) — State officer in Federal department corruptly receiving gratification in relation to principal's affairs — Whether officer agent of Federal or State government — Promise to do act which he had no power to do — Statements made in the course of investigation — Admissibility of.*

*Evidence — Wrong admission of inadmissible and prejudicial evidence — Whether s. 422 of Criminal Procedure Code (Cap. 6) should be applied to cure defect — Criminal Procedure Code s. 113(1) and Prevention of Corruption Act ss. 14 and 15(1).*

The appellant, who was a chief clerk in the mines department, appealed against his conviction and sentence of 2 years imprisonment for an offence under section 4(a) of the Prevention of Corruption Act for receiving the sum of $1,000 in relation to his principal's affairs, to wit, to assist one *R* in obtaining approval for a mining prospecting licence. On appeal it was *inter alia* contended that (a) the trial president erred in law in holding that the appellant was the agent of the State government because he was an employee of the Federation and the mines department is a Federal department (b) the alleged promise or conduct of the appellant to assist *R* did not constitute an act in relation to the affairs of